In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-17, 78-249

UNITED GAS PIPE LINE COMPANY and THE FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,

VERSUS

BILLY J. McCOMBS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL.

STANLEY L. CUNNINGHAM
PHILIP D. HART
TERRY R. BARRETT
McAFEE, TAFT, MARK, BOND, RUCKS & WOODRUFF, A Professional Corporation
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102
Attorneys for Respondents

of Counsel:
EUGENE KUNTZ
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102

January, 1979

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

AUTHORITIES CONTINUED

In the
Supreme Court of the United States
OCTOBER TERM, 1978

Nos. 78-17, 78-249

UNITED GAS PIPE LINE COMPANY and THE FEDERAL ENERGY REGULATORY COMMISSION,
Petitioners,

VERSUS

BILLY J. McCOMBS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF RESPONDENTS BILLY J. McCOMBS, ET AL.

Respondents, Billy J. McCombs, R. J. Stillings, d/b/a Gastill Company, David A. Onsgard, Basin Petroleum Corp. and Bill Forney ("McCombs") in this brief respond to briefs which have been filed by United Gas Pipe Line Company ("United") and the Federal Energy Regulatory Commission ("Commission").

I.
QUESTIONS PRESENTED

The question is *not* one of primary jurisdiction of the Commission to determine abandonment of service under Section 7(b) of the Natural Gas Act, as contended by United. To the contrary, this proceeding originated in a proceeding before the Commission and the Commission has exercised its jurisdiction. Nor is the question whether a court of appeals may independently determine whether service has been abandoned, as contended by the Commission. The court of appeals made no such determination.

What the court of appeals did determine was that the Commission erred in failing to apply the Act retroactively to reflect compliance therewith where McCombs' predecessor in good faith failed to file abandonment papers, where McCombs was innocent of that failure, and where abandonment would have been routinely granted had the proper papers been filed at the proper time. Hence, the question presented is whether the court of appeals correctly decided this issue.

There is further presented the additional question of whether McCombs' gas reserves ever fell within the ambit of a "service rendered" under Section 7(b) of the Natural Gas Act in the first place, so as to require abandonment permission.

II.
STATEMENT OF THE CASE

The following statement is submitted inasmuch as both the Commission's and United's statement of the case omit certain facts deemed relevant by McCombs.

A. PROCEEDINGS BELOW.

On October 9, 1973, United filed a complaint in this matter with the Commission, alleging that McCombs is required to deliver production from a certain oil and gas lease, located in Karnes County, Texas (the "Butler B Lease") to United under Section 7 of the Natural Gas Act, 15 U.S.C. Sec. 717, *et seq.* (1976). Hearings were held before the Commission on January 10, and February 13 and 14, 1974. The Administrative Law Judge issued his initial decision on April 26, 1974, finding that "however innocent" McCombs may have been and "however negligent United may have been in asserting its rights" (App. 16A), McCombs was required to cease delivering gas from the Butler B Lease to E. I. du Pont de Nemours & Company ("du Pont") in intrastate commerce, and to commence delivering that gas to United in interstate commerce. The Judge refused McCombs' request to authorize abandonment as of 1966, as if the proper papers had been filed then (App. 15A), which refusal was duly put before the Commission on exceptions (Pet. App. 15, 21).

On August 20, 1975, the Commission issued Opinion No. 740, holding, *inter alia*,

> "Whatever action the Commission may have taken under [Section 7(b)] from the time production ceased

in 1966 until it was resumed in 1971, it cannot consider abandonment or abandonment *nunc pro tunc* where the supply of natural gas is not depleted." (Pet. App., 31)

On judicial review, the court below held that the Commission erred in this respect:

"In the light of the facts and circumstances contained and reflected in this record, we hold that the Commission erred in concluding that the cessation of gas production on May 28, 1966, did not constitute an abandonment under Section 7(b) of the Natural Gas Act." (App. 29a)

B. THE BUTLER B LEASE AND THE 1953 CONTRACT.

In 1948, B. C. Butler, Sr., *et al.*, Lessors, executed the Butler B Lease in favor of W. R. Quin, Lessee, covering 163 acres of land in Karnes County, Texas (Ex. 19). In 1953, Mr. Quin's widow, Bee Quin, entered into a gas purchase contract (the "1953 Contract") with United covering the sale of gas well gas from the Butler B Lease (Ex. 1). In 1954, the Commission granted certificates of public convenience and necessity to Bee Quin. The Butler B Lease was thereafter transferred several times, and in March of 1966 came to rest in the hands of Louis H. Haring, *et al.* ("Haring").

At the time of that acquisition, there was one shallow (2,900 feet) well located on the Butler B Lease, but it was not producing (R. 201). Haring unsuccessfully attempted to establish production from this well, during which process a small amount of gas was obtained. All production from this well ceased on May 28, 1966 (R. 201, 202).

United and Haring exchanged correspondence reflecting that there would be no more gas available (R. 402-404; 574-579). United then removed its measuring equipment, and Haring testified that he considered the 1953 Contract to be at an end (R. 202). Although the term of the Butler B Lease was only for so long as production therefrom continued, the lease did not terminate because Haring drilled an oil well on the Butler B Lease, the production from which perpetuated the lease (R. 202).

Haring, a petroleum geologist, testified, "Certainly I was not aware of the gas reserves at deeper levels when the gas production ceased in 1966, and, so far as I know, neither United nor anyone else was aware of its existence" (R. 202).

By letters dated August 8, 1968, and January 13, 1971, the Commission invited Haring to file an abandonment application and a notice of cancellation of the rate schedule.[1] Because production had ceased, and because he was unaware of other production and he considered the 1953 Contract to have been ended, Haring testified that he and his counsel thought it unnecessary to file these papers (R. 209, 211). Until the hearing in this proceeding, McCombs did not know that Haring had not obtained abandonment permission (R. 266).

---

[1] Petitioners stated in their briefs that these letters are not a part of the record. To the contrary, these letters were a part of Docket No. G-12694, which the Commission officially noticed in Opinion No. 740 (Pet. App. 30). They are also a part of the record in the court of appeals, being attached to the Commission's motion for rehearing of the court's first opinion.

C. McCOMBS.

There were no further developments concerning the Butler B Lease until 1970 or 1971, when Bill Forney, operator for McCombs, became interested in the possibility of deeper reserves in the area. Forney entered into a contract with Haring which provided that Haring would assign Forney certain deep levels of the Butler B Lease in exchange for the drilling of a well (R. 514-529).

Mr. Forney obtained from Haring a title opinion dated March 6, 1967 covering the Butler B Lease (R. 555-561). This title opinion makes no reference to the 1953 Contract.

Mr. Forney commenced the drilling of the Butler No. 1 Well on August 27, 1971 (R. 253). He testified that at this time, in reliance on the 1967 title opinion, he believed his title to be clear (R. 253). This well was completed as a producer of gas from two deep zones (between 8,000 and 9,000 feet) and earned an assignment from Haring of certain deep levels of the Butler B Lease (R. 254).

After the completion of the Butler No. 1 Well, McCombs began to contact purchasers concerning the gas. United was the first purchaser contacted. Although other purchasers were also contacted, negotiations did not proceed to any great extent with them (R. 254). United made four written offers for a contract, the first in November of 1971, and did not claim any rights under the 1953 Contract or the Natural Gas Act (R. 93, 244, 406, 555-561, 580-583, 584-622). United's best offer was 35¢ per Mcf for the first fourteen months, and a lower rate thereafter. As this was not satisfactory, negotiations were broken off with United, and the producers sought another market (R. 261).

McCombs then entered into negotiations with du Pont resulting in a letter agreement dated April 12, 1972, with Lo Vaca Gas Gathering Company under which temporary deliveries were commenced on May 12, 1972, and culminating in a contract dated June 1, 1972, with du Pont (R. 623-626, 627-660). The contract provided for the same initial rate as United's offer, but with more satisfactory escalation provisions. Prior to April 12, 1972, United was aware that McCombs intended to sell the gas to an intrastate purchaser, but failed to assert any rights under the 1953 Contract (R. 263).

Mr. Forney obtained a title opinion dated December 7, 1971, which made a requirement related to the 1953 Contract (R. 567-573). Prior to obtaining this title opinion, Mr. Forney had no actual knowledge of the 1953 Contract (R. 257), nor did any of the other working interest owners (R. 319, 324, 327, 330). Upon receiving the title opinion, Mr. Forney contacted Haring, who indicated that he had a letter in his files releasing the gas contract (R. 257).

A supplemental division order title opinion dated May 31, 1972 (R. 668-673) did not bring forward the requirement concerning the 1953 Contract. Mr. Forney was satisfied with the form of the opinion, because he thought Haring had in his possession a letter which released the contract (R. 264).

Although Mr. Forney requested Haring to furnish a copy of the letter when he contacted him after receiving the first title opinion, it was not ultimately forthcoming until sometime after June 6, 1973 (R. 258). When it was furnished, it appeared that it was the correspondence with

United at the time of depletion of reserves in 1966 referred to above (R. 574-579).

D. UNITED ASSERTS ITS CLAIM.

On June 6, 1973, more than one year after deliveries had commenced to du Pont and more than a year and a half after United first offered to purchase the gas, United first claimed the right to purchase McCombs' gas from the Butler B Lease under the 1953 Contract (R. 764-765). On August 2, 1973, McCombs filed suit for declaratory judgment that the 1953 Contract was void, and for other relief. United counterclaimed for damages. That case is styled *Billy J. McCombs, et al.* v. *United Gas Pipe Line Company, et al.*, No. SA-73-CA-210 in the United States District Court for the Western District of Texas at Austin. Although discovery and pre-trial procedures in that case have been substantially completed, the case is presently being held in abeyance pursuant to the agreement of counsel, pending completion of the instant litigation.

III.
SUMMARY OF ARGUMENT

(i) The court of appeals properly held that the Commission erred in denying McCombs' request to apply the Act retroactively as if Haring had complied with it at the time of the depletion of his reserves in 1966. The court recognized that Haring's failure to file was in good faith. The court observed that in 1966 Haring's reserves were definitely and totally depleted, despite his diligent efforts to restore production. This fact was recognized by both the

seller and the buyer, and was contrary to their wishes. No one knew of any other reserves. Haring believed the 1953 Contract to be at an end, and therefore did not inform McCombs of it. McCombs was totally innocent. The court further observed that there are no opinions dealing with similar factual situations.

Where a party is in good faith in failing to file, the courts have uniformly required the Commission to apply the Act retroactively to reflect compliance, *i.e.*, as if the papers had been filed at the *proper time*. In the instant case, the Commission was similarly asked to apply the Act retroactively as of 1966. In the light of the evidence existing *at that time*, the court of appeals properly held that the Commission's failure to do so was erroneous.

The court held that the Commission erred as a matter of law, as opposed to a matter of fact. That is, the error committed was not as to a factual issue within the expertise of the Commission. Instead, the Commission's error consisted of considering the wrong evidence in refusing to apply the Act retroactively. The Commission disregarded the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed, and applied the evidence as it existed in 1975, when it issued its opinion. *The only* evidence concerning the facts existing in 1966 was the testimony of Haring, a petroleum geologist, that he had failed after diligent efforts to restore production and that neither he nor United nor anyone else knew of any other reserves. Since the Commission could have reached but one conclusion based on this evidence, the court deemed it unnecessary to remand to the Commission to enter an order accordingly.

This proper retroactive application of the Act would not deprive the Commission of exercising its Section 7(b) authority, nor deprive interested parties of the right to be heard on the issue of abandonment, as argued by the Commission and United. In this case, the Commission was not *deprived* of its Section 7(b) authority, but rather was asked to *exercise* that authority by retroactively applying the Act on the basis of the record in the instant case. Further, no interested party has been deprived of the right to be heard on the issue of abandonment because that issue was one of the issues which was actually tried before the Administrative Law Judge in this case. All interested parties had notice of this proceeding and an opportunity to be heard, and United and the Commission in fact participated. Yet, the only evidence adduced as to the facts as they existed in 1966 was the testimony of Haring that no one knew of any other reserves at that time.

(ii) McCombs' gas reserves are not within the prohibition of Section 7(b) of the Natural Gas Act. Section 7(b) applies to any *service rendered* by means of jurisdictional facilities. The Commission and United argue that the court of appeals erred because the provisions of Section 7(b) of the Act were not complied with. The premise of this argument is that Section 7(b) is applicable not only to Haring's shallow reserves from which there was a "service rendered" but also to McCombs' deep reserves from which there was no "service rendered." This premise is in error.

The legislative history of Section 7(b) and the decided cases firmly establish that the words "service rendered"

are to be given their plain meaning, *i.e.*, "service" is "rendered" when reserves of natural gas are physically delivered in interstate commerce. This is so because the purpose of Section 7(b) is to require the continuation of deliveries of natural gas in interstate commerce once those deliveries have commenced and the public has thereby relied upon the reserves supporting those deliveries. Once deliveries have been commenced and the public has thereby relied on the reserves supporting those deliveries ". . . there can be no withdrawal of that supply from continued interstate movement without the Commission's approval." *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539, 4540 (1978); *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137, 156 (1960); *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378, 389 (1959).

The fact that gas reserves may be covered by a certificate, a contract, or an oil and gas lease creates no Federal statutory obligation under Section 7(b) to commence initial deliveries or to continue those deliveries once commenced. That statutory obligation is found only in Section 7(b), which is invoked only by the commencement of deliveries.

Thus, once Haring had commenced deliveries from his reserves, he was required to continue ". . . down to the exhaustion of the reserve . . ." (*Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962)) and ". . . so long as production continues. . . ." *Harper Oil Company* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960). McCombs' reserves, however, were discovered more than five years after Haring's were depleted and lie at depths more than a mile greater than those of

Haring. No reliance has been placed on McCombs' reserves, and McCombs has never commenced deliveries from them in interstate commerce. No Federal statutory obligation to continue deliveries has therefore attached to McCombs' reserves.

United's right to purchase reserves upon which no reliance has been placed rests, not on Federal law, but upon the enforceability of the 1953 Contract under state law. This issue is pending before the district court in the Austin litigation. If McCombs is unsuccessful in this litigation, then McCombs must commence deliveries to United from his reserves, the public will rely thereon, and the Federal statutory obligation under Section 7(b) will then attach.

(iii) The Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3350 (1978), has little relevance to this case. The fact that McCombs' reserves are not within one of the statutory *exclusions* to the definition of "committed or dedicated to interstate commerce" contained in that Act is meaningless, because McCombs' reserves are not within the definition itself. Further, it is difficult to see how any manifestations of intent by the 95th Congress which enacted the Natural Gas Policy Act of 1978 can shed light on the intent of the 75th Congress which enacted the Natural Gas Act in 1938, or what relevance the intent of the 95th Congress would have to this case if it were attributed to the 75th Congress.

IV.
ARGUMENT

A. THE COURT OF APPEALS PROPERLY HELD THAT THE COMMISSION ERRED IN FAILING RETROACTIVELY TO APPLY THE NATURAL GAS ACT.

1. **Introduction.** The court of appeals properly viewed this case as one dealing with the consequences of Haring's failure to file the proper papers with the Commission at the proper time.

The court recognized that Haring's failure to do so was in good faith. He was without the benefit of definitive legal precedents. The court observed, "[w]e know of no opinion dealing with a factual situation similar to that presented here" (App. 29a). The court further observed that in 1966 Haring's reserves were definitely and totally depleted, despite his diligent efforts to restore production (App. 27a). This fact was recognized by both the seller and buyer and was contrary to their wishes (App, 27a). No one knew of any other reserves (App. 28a). Haring believed the 1953 Contract to be at an end (App. 25a). He therefore did not inform McCombs of its existence (App. 25a). McCombs was totally innocent.

In view of these facts, the court held that the Commission erred in denying McCombs' request to apply the Act retroactively as if Haring had complied with it in 1966 (App. 29a). The decided cases demonstrate that this holding was proper.

2. **Good Faith Failures to File.** The courts have addressed the consequences of a good faith failure of the

proper party to file the proper papers with the Commission at the proper time in four cases. In *Plaquemines Oil and Gas Company* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971) and *Highland Resources, Inc.* v. *FPC*, 537 F.2d 1336 (5th Cir. 1976), the party had failed to file in good faith and the court required a retroactive application of the Act, as if the party had complied at the time required. In *Borough of Ellwood City* v. *FERC*, 583 F.2d 642 (3rd Cir. 1978) and *Niagara Mohawk Power Corporation* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), the Commission itself retroactively applied the Act as if the party had applied at the required time.

The *Ellwood* case arose out of this Court's holding in the *Colton* case, *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964). In the *Ellwood* case, Pennsylvania Power Company had been purchasing power generated outside the State of Pennsylvania and had filed rates for service to Ellwood with the Commission. Penn Power then started generating within the state a part of its power requirements which were sufficient to serve Ellwood's needs, and therefore considered the service to Ellwood not within the Commission's jurisdiction. Penn Power then filed rates with the Pennsylvania Public Utilities Commission and was regulated by that Commission until this Court's decision in the *Colton* case which held that sales similar to those made by Penn Power to Ellwood were subject to the jurisdiction of the Commission because a part of the Company's power supplies were generated out of state. Penn Power then filed rate schedules with the Commission. Ellwood claimed that, during the interim, it had been charged rates which were in excess of Penn Power's rates which were on file with

the Commission and requested refunds accordingly. The Commission applied the Act as if Penn Power had properly filed rates with the Commission during the interim, and did not require refunds. On judicial review, the court affirmed. The court observed "[n]o statutory language prescribed the proper treatment for those who have in good faith failed to file." 583 F.2d at 647. The court held "[s]ince the companies were not culpable, they should not be punished for technical non-compliance." 583 F.2d at 648.

Similarly, *Plaquemines* arose out of this Court's decision in *State of California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), which held that the Commission had jurisdiction over any sales of natural gas actually commingled with gas to be resold in interstate commerce. Plaquemines had failed to make the applicable rate filings with the Commission prior to the Court's decision in *Lo-Vaca*. Contrary to its treatment in *Ellwood*, however, the Commission did not apply the Act retroactively as if Plaquemines had complied therewith, and required refunds on the basis that Plaquemines had not filed. On judicial review the Court reversed, holding that the Commission should ". . . regard as being done that which should have been done by recreating the past, insofar as is reasonably possible, to reflect compliance with the Act. . . ." 450 F.2d at 1337.

In *Highland Resources*, Highland had applied for a small producer's certificate and, relying on provisions of the Commission's regulations, failed to file notices of change in rate while the application was pending. The application was later denied by the Commission, and Highland filed the appropriate papers and ". . . asked that they be given

nunc pro tunc effect to July 21, 1974." 537 F.2d at 1339. The Commission refused. The Court reversed, holding that "[t]he FPC does not allege that Highland's application for a small producer certificate was patently frivolous or in bad faith . . . On remand, the Commission should give Highland's filings of June 11, 1975 retroactive effect." 537 F.2d at 1339.

Niagara Mohawk arose out of the Commission's long standing policy of dating hydroelectric licenses to reflect compliance with Section 23 of the Federal Power Act, 16 U.S.C. § 792 *et seq.* (1976), as if the licensee had applied for the license at the proper time, *See* the *Androscoggin* case, *Public Service Company of New Hampshire*, 27 FPC 830 (1962). The Commission had applied this practice since some time prior to 1944. *See Metropolitan Edison Company*, 6 FPC 189 (1947).

A final analogy is found in the aftermath of this Court's decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954). In applying its jurisdiction to independent producers under the *Phillips* case, the Commission consistently treated producers as having complied with the Act prior to the date of that case. *See* Order Nos. 174, 174-A and 174-B, 13 FPC 1195, 1410, 1576 (1954). This treatment included the abandonment provisions of Section 7(b) of the Act. In *Hewitt and Dougherty*, Docket No. CI75-762, ... FPC ..... (August 12, 1976), the well was depleted in April of 1954, and deliveries ceased before this Court's decision in *Phillips* on June 7, 1954. Citing Order No. 174, the Commission held "[w]e agree with Petitioner's arguments that Section 7(b) is not applicable . . . [i]nas-

much as H&D made no further sales from the Wright well after the April, 1954 cut-off date, H&D was neither required [to seek a certificate] nor seek abandonment approval . . ." (Mimeo, pp. 2, 3).

All of these situations have a common thread: the party was in good faith in failing to file, and the Commission applied the Act, or was required by the courts to apply the Act, as if the party had filed *at the proper time*. In the instant case, the Commission was similarly asked to apply the Act retroactively as of 1966. In the light of the evidence existing *at that time*, the court of appeals found that the Commission's failure to do so was erroneous.

The court held that the Commission had erred *as a matter of law* — not as to a matter of fact (App. 31a). That is, the error committed was not as to a factual issue within the expertise of the Commission. Instead, the Commission's error consisted of considering the wrong evidence in refusing to apply the Act retroactively. The Commission disregarded the only evidence in the record concerning the facts as they existed in 1966, when the papers should have been filed, and applied the evidence as it existed in 1975, when it issued its Opinion (Pet. App. 31). The *only* evidence concerning the facts existing in 1966 was the testimony of Haring, a petroleum geologist, that he had failed after diligent efforts to restore production, and that neither he nor United nor anyone else knew of any other reserves. Since the Commission could have reached but one conclusion based on this evidence, the court deemed it unnecessary to remand to the Commission to enter an order accordingly (App. 33a).

The court's holding is also within its equitable powers, for it fails to impose the devastating consequences of Haring's omissions on an innocent third party, McCombs.

3. **Haring's Actions Were in Good Faith.** When Haring acquired the Butler B Lease in 1966, the one gas well located on the lease was not producing (R. 201). He expended considerable efforts in attempting to re-establish production but his efforts ended in failure. He testified that he first installed a compressor at a cost of $12,000, and the well produced for approximately ten days and then was overcome by salt water (R. 201). He then brought in a workover rig and attempted workover operations for approximately two months during which small amounts of gas were porduced (R. 201). All production ceased on May 28, 1966 (R. 201). Haring was a petroleum geologist, and testified that neither he nor United, nor anyone else knew of any further production (R. 203). Since he believed that there was no more gas to deliver and since United had removed its equipment, he considered the 1953 Contract at an end (R. 202). When he received the Commission's letters inviting him to file an abandonment application, he consulted with his lawyer (R. 209). Neither Haring nor his counsel thought it necessary to file abandonment papers with the Commission under these circumstances (R. 211).

Their conclusions appear justified in the light of the existing judicial statements. In *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962), the court had said,

> ". . . the duty to continue to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve*, or until the Commission, on appropriate terms, permits cessation of service under Sec. 7(b). . . ." (Emphasis added)

And in *Harper Oil Company* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960), the court had said:

> "It would thus seem clear that when once an independent producer of gas has dedicated his production to interstate commerce and thereby has come under the jurisdiction of the Commission, he remains thereunder *so long as production continues.*" (Emphasis added)

Indeed, as recently as April 17, 1978, in oral argument before this Court in the case of *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978), the Commission adhered to those statements:

> "The Commission's position here is that this gas is dedicated *until the reserve is exhausted*, that in the words of the *Hunt* case the duty to deliver and sell flows with the gas from the moment of first delivery *down to the exhaustion of the reserve.*" (Emphasis added) Transcript, p. 11.

Haring justifiably could not believe that he would be required to continue service after no more gas could be produced from his well.

United, like Haring, did not think it necessary to file abandonment papers with the Commission when it removed its facilities, although Section 7(b) of the Act is equally binding on it. *United Gas Pipe Line Company* v. *FPC*, 385 U.S. 83 (1966). Similar to Haring, United's witness testified that ". . . we don't feel that's necessary" (R. 82).

In the light of the facts as they were known then, the filing could only have been for the purpose of the Commission's records, because the Commission could have taken no action in denying abandonment which was inconsistent with the facts. Further, the Commission, until the issuance of its opinion in the instant case, had done nothing to dispel the courts' statements in the *Hunt* and *Harper* cases and, according to the oral argument in *Southland*, continues to adhere to them today.

4. **Abandonment Permission Would Have Been Routinely Granted in 1966.** The Commission handles nearly all producer abandonment applications in routine fashion, merely acting on the papers without a formal evidentiary hearing. In 1966, the Commission disposed of 154 producer abandonment applications. Of these 154, only one was set for formal hearing and it was granted. *Charles L. Reed, et al.*, 35 FPC 954 (1966). The remaining 153 were disposed of without formal hearing, with 151 being granted. *See Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period January 1, 1966 through June 30, 1966, 35 FPC 1201-1203 (1966); *Producer List*, Producer Applications for Abandonment of Service Disposed of During the Period July 1, 1966 through December 31, 1966, 36 FPC 1216-1221 (1966). Similar patterns exist for other years.

In light of the facts as Haring knew them in 1966, there is no doubt that the Commission would have granted him abandonment permission and probably would have done so in a routine fashion, as indicated above.

The Commission has recently recognized that it should grant abandonment where to do so merely recognizes what has occurred *de facto*. In *Arkansas Louisiana Gas Company*, Docket No. CP76-329, ... FPC ..... (March 8, 1977), Arkansas Louisiana Gas Company ("Arkla") had been selling excess gas to Mississippi River Transmission Company ("MRT"). However, in 1971 Arkla ceased delivering to MRT, and did not anticipate (as Haring did not in this case) that it would ever again have any excess gas to sell to MRT. The Commission held, "[u]pon consideration, we are persuaded that [the] public convenience and necessity will best be served by granting Arkla's application, thus lending *de jure* force to a state of affairs which has occurred *de facto*" (Mimeo. p. 2).

5. **A Proper Retroactive Application of the Act Neither Bypasses the Commission's Function Nor Deprives Interested Parties of a Right to be Heard.** The Commission and United argue against a proper retroactive application of the Act in this case on the grounds that the Commission would be deprived of exercising its Section 7(b) authority and that interested parties would be deprived of their right to be heard on the issue of abandonment.

This argument overlooks the fact that in this case the Commission was not *deprived* of its Section 7(b) authority, but rather McCombs asked the Commission to *exercise* that authority by retroactively applying the Act.[2] Further, no interested party has been deprived of a right to be heard on the issue of abandonment because that issue was one

[2] In making this request, McCombs properly reserved his objections to the Commission's jurisdiction.

of the issues which was actually tried before the Administrative Law Judge in this case, of which all interested parties had notice and opportunity to be heard, and in which United and the Commission in fact participated.

Due notice of the proceeding was issued by the Commission (R. 738). McCombs raised this issue in his first amended answer to United's complaint (R. 860-865). This answer was filed on January 8, 1974 at an early stage in the proceedings, and before the hearing conducted by the Administrative Law Judge. All interested parties had an opportunity to be heard and to introduce evidence on the issue. Yet, the only evidence produced was the testimony of Haring that neither he nor anyone else knew of any further production in 1966.

Therefore, if the court agrees with McCombs that retroactive application of the Act is proper in this case, the Commission will not be deprived of *exercising* its powers under Section 7(b), nor have the parties been deprived of a hearing on the issue.

B. McCOMBS' GAS RESERVES ARE NOT WITHIN THE PROHIBITION OF SECTION 7(b) OF THE NATURAL GAS ACT.

1. **Section 7(b) Applies to "Service Rendered."** Section 7(b) of the Act reads as follows:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any *service rendered* by means of such facilities, without the permission and approval of the Commission first had and obtained after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." 15 U.S.C. § 717 f(b). (Emphasis added)

The Commission and United argue that the court of appeals erred in reversing the Commission's order in this case because the abandonment provisions of Section 7(b) were not complied with. The premise of this argument is that Section 7(b) is applicable, not only to Haring's shallow reserves from which there was "service rendered," but also to McCombs' deep reserves, from which there was no "service rendered."[3] This premise is in error. The cases construing Section 7(b) and the legislative history of that section clearly demonstrate that it is invoked only upon the commencement of deliveries of natural gas in interstate commerce. Once deliveries have been commenced, and the public has thereby relied on reserves supporting those deliveries, ". . . there can be no withdrawal of that supply from continued interstate movement without the Commission's approval." *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. at 4540; *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. at 156; *Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. at 389.

Thus, once Haring had commenced deliveries from his reserves, he was required to continue ". . . down to the exhaustion of the reserve . . ." (*Hunt* v. *FPC*, 306 F.2d at 342) and ". . . so long as production continues. . . ." *Harper Oil Company* v. *FPC*, 284 F.2d at 139. McCombs' reserves,

---

[3] The court of appeals did not decide this broader issue of statutory construction, preferring instead to base its decision on the narrower equitable grounds set forth above.

however, were discovered more than five years after Haring's were depleted and lie at depths more than a mile greater than those of Haring. No reliance has been placed on McCombs' reserves, and McCombs never commenced deliveries from them in interstate commerce. They are not therefore within the abandonment prohibition of Section 7(b).

United's right to purchase reserves upon which no reliance has been placed rests, not on Federal law, but on the enforceability of 1953 contract under state law. This issue is pending before the district court in the Austin litigation.

2. **"Service Rendered" Involves Reliance by the Public.** Reliance is at the heart of Section 7(b). Once deliveries have been commenced in interstate commerce, and the public has relied on the reserves supporting those deliveries, Section 7(b) is applicable to those reserves, and contractual provisions which would cut off continuing deliveries must yield. *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978). The legislative history of that section clearly demonstrates that reliance is its touchstone.

The original drafts of the bills which evolved into the Natural Gas Act did not contain a requirement to obtain abandonment authority. H.R. 1162 and S. 4480. An amendment was offered during the subcommittee hearing on the House version on April 3, 1936, which provided:

> "No gas company, which is supplying gas to a public utility company, engaged in distributing such gas to the public, shall *discontinue* service to such public utility company without first obtaining from the Commission a certificate that public convenience and necessity permit such abandonment." (Emphasis supplied)

The amendment was based on a similar provision of the Interstate Commerce Act, 49 U.S.C. § 1(18). In commenting on the purpose of the amendment, the author stated:

> "If a company has established service to a distributing company, on which the public are dependent, and a rate is fixed by the Federal tribunal for that service which the company does not like, the company should not be in a position to say, 'we are permitted to abandon our service, and we will abandon it.' " *Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives,* 74th Congress, 2nd Session, p. 92.

This purpose has likewise been recognized extensively by the courts.[4]

In its order below, the Commission acknowledged:

> "And they [McCombs] are undoubtedly correct in their assertion that the purpose of Section 7(b) is to require the continuance of service once it has been commenced and the public has relied on it, and further, that Section 7(b) could not as a practicable matter have served that purpose when natural gas service from the Butler B tract was discontinued in 1966. . . ."

---

[4] *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539, 4540 1978); *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 154 (1960); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 389 (1959); *Alabama-Tennessee Natural Gas Co.* v. *FPC*, 417 F.2d 511, 515 (5th Cir. 1969); *Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962); *Harper Oil Co.* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960); *Michigan Consolidated Gas Co.* v. *FPC*, 283 F.2d 204, 214 (D.C. Cir. 1960); *Sunray Mid-Continent Oil Co.* v. *FPC*, 239 F.2d 97, 101 (10th Cir. 1956); *J. M. Huber Corporation* v. *FPC*, 236 F.2d 550, 558 (3rd Cir. 1956); *Farmland Industries* v. *Kansas-Nebraska Natural Gas Co., Inc.*, 349 F.Supp. 670, 680 (D.C. Nebr. 1972).

Applying these principles to the case at bar, it is manifest that the legislative purpose of Section 7(b) would not be served by the Commission's interpretation. The "service rendered" in this case was that by Haring and his predecessors, from formations at approximately 2,900 feet, which service was discontinued due to exhaustion of reserves in 1966. Thus, the legislative purpose of requiring *continuing* service cannot be served by requiring McCombs, thirteen years later, to deliver to United from the deep reserves which McCombs discovered in 1971. Further, Mr. Haring testified,

> "Certainly, I was not aware of gas reserves at deeper levels when gas production ceased in 1966, and, so far as I know, neither United nor anyone else was aware of its existence" (R. 202).

Clearly, no reliance has been placed on the deep reserves discovered by McCombs in 1971. The legislative purpose of requiring continuance of deliveries upon which the public had relied would not be served in this case by the Commission's interpretation of the Natural Gas Act.

3. **The Words "Service Rendered" Are to Be Accorded Their Plain Meaning.** In this case, there has been an exhaustion of reserves from shallow reservoirs by predecessors in interest, and the Commission seeks to order successors in interest to make initial deliveries from deep reservoirs which they have discovered and which were previously unknown. There are no reported cases dealing with this situation. However, the reported cases do demonstrate that the mere fact that the deep reserves are covered by the same certificate, contract, or lease as the shallow reserves does not bring the deep reserves within Section

7(b). Hence, the Commission's emphasis on the fact that ". . . there was no provision in the lease, the contract, or the certificate limiting the depth of origin of the gas to be delivered from the Butler B tract . . ." (Commission's Brief, p. 5) provides no support for its position.

"Service rendered" is not dependent on or measured by a certificate, for the reason that service is required to be continued under Section 7(b) even where there is no certificate, *Mesa Petroleum Co.* v. *FPC*, 441 F.2d 182 (5th Cir. 1971). Moreover, the issuance of a certificate does not require service to be initiated. *Sun Oil Co.* v. *FPC*, 364 U.S. 170 (1960); *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137 (1960); *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959). Under these cases, the Commission does not have authority to require initial deliveries merely because gas is covered by a certificate.

For example, assume a pipeline company were to be granted a certificate authorizing it to serve two customers, A and B. The company commences deliveries to A, but not to B. A has then relied on deliveries to it and is entitled to the protection of Section 7(b). However, the mere fact that deliveries have commenced to A and that the same certificate authorizes services to both A and B does not require the company to deliver to B. B is entitled to the protection of Section 7(b) only when deliveries have been commenced to B, i.e., when there is "service rendered," and B has relied thereon. Similarly, the fact that Haring commenced deliveries from his reserves and that the same certificate authorized service from both Haring's and McCombs' reserves, does not require McCombs to deliver to

United. The public is entitled to the protection of Section 7(b) only when deliveries have commenced, *i.e.*, where there has been a "service rendered" and the public has relied on the reserves supporting those deliveries.

Just as "service rendered" is not dependent on or measured by a certificate, neither is it dependent on or measured by a gas purchase contract. Service must be continued although there is no contract. *Nelson Bunker Hunt Trust Estate*, 15 FPC 743 (1956); *Dixie Pipe Line Co.*, 14 FPC 106 (1955). Service must also be continued even though the contract is terminated. *United Gas Pipe Line Co.* v. *FPC*, 385 U.S. 83 (1966); *Harper Oil Co.* v. *FPC*, 284 F.2d 137 (10th Cir. 1960); *J. M. Huber Corp.* v. *FPC*, 236 F.2d 550 (3rd Cir. 1956), *cert. denied* 352 U.S. 971 (1957); *FPC* v. *J. M. Huber Corp.*, 133 F.Supp. 479 (D.N.J. 1955). Further, the Commission does not have the authority to require the initiation of service merely because a producer's reserves are covered by a contract. *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378 (1959).

In similar manner, it may be shown that "service rendered" is not measured by the oil and gas lease described by the gas purchase contract for the reason that service must be continued although the lease terminates. *State of California* v. *Southland Royalty Co.*, 46 U.S.L.W. 4539 (1978). Further, oil and gas leases are not "facilities subject to the jurisdiction of the Commission" within the meaning of Section 7(b) and are therefore transferable without Commission authorization under Section 7(b) where, as here, they do not constitute a sale for resale of developed

reserves to an interstate pipe line company. *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392 (1965).

Thus, the teaching of the decided cases is that "service rendered" under Section 7(b) of the Act does not mean the service "authorized" by a certificate under Section 7(c) of the Act, nor is it measured by the gas purchase contract under which service is authorized to commence, nor the oil and gas lease which is covered by that gas purchase contract. The conclusion is inescapable that "service rendered" includes no more than the plain meaning which those words would indicate: the actual deliveries of gas in interstate commerce.

Applying this rule to the facts at hand, the "service rendered" to which the prohibition of Section 7(b) applies was the deliveries by Haring, and his predecessors, from reservoirs underlying the Butler B Lease at a depth of approximately 2,900 feet. That service was discontinued in 1966 due to depletion of reserves. The production discovered by McCombs in 1971 is from other reservoirs at approximately 8,000 to 9,000 feet, and was unknown at the time of the depletion of the Haring reserves in 1966. This production is thus separate and distinct from the "service rendered" by Haring and his predecessors, and is therefore not within the prohibition of Section 7(b) of the Act.

4. **A Contrary Construction of the Words "Service Rendered" Would Require Federal Law to Invade Legitimate State Interests Where There is No Federal Interest to Protect.** The Commission's interpretation of the Act in this case makes

the Act a silent lien on an oil and gas lease because there is no method by which a producer proposing to take an assignment of an oil and gas lease can protect himself from the consequences of the Commission's interpretation; *i.e.*, there is no method by which the assignee can determine whether the Commission has permitted abandonment with respect to a particular lease.

The Commission's abandonment orders are not filed of record in the county recorder's office, and are probably not recordable in most states. Further, inquiry to the Commission would prove futile. The Commission's records are not kept by tracts, and the names under which the Commission's dockets are kept may or may not appear in the producer's chain of title because the Commission requires that only "operators" make filings with the Commission, which "operator" may or may not have had a leasehold interest in the lease in question. Moreover, the Commission's Staff is ill-equipped and probably unprepared to make a search in response to a producer's inquiry.

The Commission's interpretation of the Act is therefore unreasonable, and at odds with the legitimate State policy of free alienability embodied in the recording acts. Further, this interpretation is not required, because in this case there is no Federal interest to be protected in requiring continuing deliveries.

5. **Summary.** The "service rendered" from the Butler B Lease was abandoned by Haring in 1966 due to the depletion of known reserves. McCombs discovered separate and distinct reserves in 1971, upon which the public has not relied. McCombs had no knowledge that the Commis-

sion had not permitted abandonment in 1966, and there is no method available by which he might have protected himself in this regard. The courts have recognized that the requirement to continue service lasts only "down to the exhaustion of the reserve" (*Hunt* v. *FPC*, 306 F.2d 334, 342 (5th Cir. 1962)), and only "so long as production continues." *Harper Oil Co.* v. *FPC*, 284 F.2d 137, 139 (10th Cir. 1960). Hence, in 1966 the requirement to continue service from the Butler B Lease came to an end.

C. THE NATURAL GAS POLICY ACT OF 1978 HAS LITTLE RELEVANCE TO THIS CASE.

The Natural Gas Policy Act of 1978 contains a definition of "committed or dedicated to interstate commerce," as follows:

> "(A) GENERAL RULE.—The term 'committed or dedicated to interstate commerce,' when used with respect to natural gas, means—
>
> (i) natural gas which is from the Outer Continental Shelf; and
>
> (ii) natural gas which, if sold, would be required to be sold in interstate commerce (within the meaning of the Natural Gas Act) under the terms of any contract, any certificate under the Natural Gas Act, or any provision of such Act.
>
> (B) Exclusion.—Such term does not apply with respect to—
>
> (i) natural gas sold in interstate commerce (within the meaning of the Natural Gas Act)—
>
> (I) under section 6 of the Emergency Natural Gas Act of 1977;

(II) under any limited term certificate, granted pursuant to section 7 of the Natural Gas Act, which contains a pregrant of abandonment of service for such natural gas;

(III) under any emergency regulation under the second proviso of section 7(c) of the Natural Gas Act; or

(IV) to the user by the producer and transported under any certificate, granted pursuant to section 7(c) of the Natural Gas Act, if such certificate was specifically granted for the transportation of that natural gas for such user;

(ii) natural gas for which abandonment of service was granted before the date of enactment of this Act under section 7 of the Natural Gas Act; and

(iii) natural gas which, but for this clause, would be committed or dedicated to interstate commerce under subparagraph (A)(ii) by reason of the action of any person (including any successor in interest thereof, other than by means of any reversion of a leasehold interest), if on May 31, 1978—

(I) neither that person, nor any affiliate thereof, had any right to explore for, develop, produce, or sell such natural gas; and

(II) such natural gas was not being sold in interstate commerce (within the meaning of the Natural Gas Act) for resale (other than any sale described in clause (i)(I), (II), or (III)." Section 2(18).

The third exclusion to the definition contained in (B)(iii) is, according to the Conference Committee Report, intended to limit further extensions of this Court's holding in *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978). The Commission and United argue

that it is significant that McCombs' gas does not fall within the *Southland* exclusion.

This argument is of little consequence, for the reason that the McCombs' reserves are not within the definition itself. That is to say, as demonstrated above, the gas is not required to be sold in interstate commerce. There is therefore no need for the gas to fall within one of the statutory exclusions to that definition. Further, it is difficult to see how any manifestations of intent by the 95th Congress which enacted the Natural Gas Policy Act of 1978 can shed light on the intent of the 75th Congress which enacted the Natural Gas Act in 1938, or what relevance the intent of the 95th Congress would have to this case if it were attributed to the 75th Congress.

It is, however, worthy to note that under Section 601(a)(1)(b) of the Natural Gas Policy Act, Section 7(b) of the Natural Gas Act no longer applies to wells commenced after February 19, 1977, regardless of whether gas produced from those wells is sold for resale in interstate commerce. As the average life of a natural gas well is 15 years,[5] the problem in the instant case will rapidly recede into history with the passage of time. Moreover, it is significant that the 95th Congress did not consider a Federal statutory obligation to continue service rendered to be an essential part of a scheme for regulation of producer prices which is similar to that under the Natural Gas Act. There is no provision similar to Section 7(b) contained in the Natural Gas Policy Act.

---

[5] See FPC Opinion No. 770 ..... FPC ..... (1976) mimeo. p. 23.

Finally, whatever the term "dedicated" may mean under the Natural Gas Policy Act of 1978 is not relevant to this case, because here the question is what that term means with respect to the Natural Gas Act. This Court, in *State of California* v. *Southland Royalty Company*, 46 U.S.L.W. 4539 (1978), recently answered by holding that "dedicated" with respect to the Natural Gas Act simply means that the gas is subject to Section 7(b) of the Act. The issue in this case is similar: whether McCombs' gas reserves are subject to Section 7(b) of the Natural Gas Act.

V.
CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

STANLEY L. CUNNINGHAM
PHILIP D. HART
TERRY R. BARRETT
McAFEE, TAFT, MARK, BOND, RUCKS & WOODRUFF, A Professional Corporation
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102
Attorneys for Respondents

of Counsel:
EUGENE KUNTZ
Fifth Floor, 100 Park Avenue
Oklahoma City, Oklahoma 73102

January, 1979